IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-966

ROBERT M. FLANNERY,

Appellant,

v.

CITY OF NORFOLK, VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

THE OPINIONS BELOW

The Opinion of the Supreme Court of Virginia is reported at 216 Va.___, 218 S.E.2d 730 (1975), and appears herein as Appendix A. No other written opinions have been delivered.

B

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This is a criminal prosecution against the appellant, Robert M. Flannery, charged and convicted in the Circuit Court of the City of Norfolk, Virginia, of keeping and maintaining a disorderly house in violation of Section 31-18 of the City Code of the City of Norfolk, Virginia, 1958. The appellant contends that Section 31-18 is unconstitutional on its face, being void for vagueness. The decision of the Supreme Court of Virginia was in favor of the validity of Section 31-18.

(ii) The judgment or decree sought to be reviewed is the ruling of the Supreme Court of Virginia upholding the constitutionality of the ordinance and affirming the appellant's conviction. That ruling was issued and entered on October 10, 1975. No petition for rehearing was filed. The Notice of Appeal was filed in the Supreme Court of Virginia, the court possessed of the record, and this jurisdictional statement was filed in the Supreme Court of the United States within ninety days after October 10, 1975.

(iii) The jurisdiction of this court is invoked under 28 U.S.C., Section 1257(2). The following decisions sustain the jurisdiction of the SupremeCourt to review the judgment on appeal in this case:

Giaccio v. Pennsylvania, 382 U.S. 399 (1966);
Hoyt v. Florida, 368 U.S. 57 (1961).

(iv) The constitutional validity of Section 31-18 of the City Code of the City of Norfolk, Virginia, 1958, is here involved. The full text of that ordinance is as follows:

Sec. 31-18. Disorderly houses.

"It shall be unlawful for any person in the city to keep, maintain or operate, for himself or as an officer of or agent for any corporation, association, club, lodge or other organization, or under the guise of any corporation, association, club, lodge or other organization, any disorderly house or place where disorderly persons meet or may meet for the purpose of illegally dispensing or indulging in intoxicating liquors, gaming or boisterous or other disorderly conduct. Each day's keeping of any such place shall constitute a separate offense, and in any prosecution for this offense, the general reputation of such place may be proved.

"It shall be unlawful for any person to frequent, reside in or visit any such place for the purpose of illegally dispensing or indulging in intoxicating liquors, gaming or boisterous or other disorderly conduct.

"Any person violating the first paragraph of this section shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars or by confinement in jail not exceeding six months, either or both; and any person violating the second paragraph of this section shall be punished by a fine of not less than five dollars nor more than one hundred dollars."

QUESTION PRESENTED BY THE APPEAL

A portion of Section 31-18 of the City Code of the City of Norfolk, Virginia, 1958, makes it unlawful for any person to keep, maintain or operate any disorderly house. The question presented is whether that portion

of the ordinance is void for vagueness, both in the sense that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States v. Harriss*, 347 U.S. 612, 617 (1954), and because it encourages arbitrary and erratic arrests and convictions. *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Herndon v. Lowry*, 301 U.S. 242 (1937).

STATEMENT OF THE FACTS OF THE CASE

Robert M. Flannery, the appellant herein, was charged in an arrest warrant with "keeping and maintaining a disorderly house" on or about February 28, 1974, in violation of Section 31-18 of the City Code of the City of Norfolk, Virginia, 1958. He was convicted of that offense, a misdemeanor, in the lower court not of record and, in a trial de novo, in the Circuit Court of the City of Norfolk without a jury. One of the central issues at trial was whether the "Business Man's Massage Parlor", admittedly owned and operated by the appellant, was a disorderly house on or about February 28, 1974, within the meaning of the City Code.

The evidence accepted by the trial court established that on February 28, 1974, Carl E. Peterson, a Norfolk police officer, visited the "Business Man's Massage Parlor". He paid fifteen dollars and received a sauna, a shower and a massage which included masturbation by a female masseuse. After the massage, Officer Peterson paid the masseuse an additional fifteen dollars. Thereupon, "she proceeded to give oral sodomy."

(Tr. 123)[1] He interrupted her, got dressed, and left the massage parlor. Officer Peterson did not see the appellant during the course of his visit.

In addition to Officer Peterson's experiences, the prosecution introduced evidence of prior occasions from August 24, 1973, to February 8, 1974, where male undercover police officers or paid male informers visited the "Business Man's Massage Parlor".[2] The testimony showed that on these prior occasions the female massueses, who were Flannery's employees, performed various "services" which included acts of masturbation and oral sodomy. The massueses were virtually nude while engaged in these activities. The evidence also established that the masseuses solicited the clientel for prostitution and sodomy. Furthermore, there was testimony that the massage parlor, which was open to the public, was reputed in the community to be a brothel.[3] Evidence that Flannery knew of these specific instances at the time they occurred was non-existent.

Flannery attacked the constitutionality of the ordinance in the Circuit Court of the City of Norfolk

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[1]References marked "Tr." are to the transcript of the trial in the Circuit Court of the City of Norfolk.

[2]In Virginia, in order to prove that an establishment is a disorderly house, there must be a recurrence of the improper practices. "It is sufficient to meet this requirement if they occur with such frequency, and during such substantial period of time covered by the indictment, as to constitute a continuing menace to public morals." *Pope v. Commonwealth*, 131 Va. 776, at 797, 109 S.E. 429, at 436 (1921).

[3]Section 31-18 of the City Code of the City of Norfolk, Virginia, provides, in part, "...in any prosecution for this offense, the general reputation of such place may be proved."

and in the Supreme Court of Virginia. In the trial and on appeal, he argued that Section 31-18 of the City Code of the City of Norfolk, Virginia, 1958, is void for vagueness and therefore unconstitutional on its face under the Fourteenth Amendment of the United States Constitution. On May 24, 1974, the trial court denied Flannery's constitutional challenge in an oral opinion rendered from the bench at the conclusion of the trial. [Tr. 10 (25)–15 (8); 342 (14)–342 (21)]. On October 10, 1975, the Supreme Court of Virginia held that the portion of the city ordinance under which Flannery was convicted, i.e., "keeping and maintaining a disorderly house", was separable from the remainder of the ordinance and the separable portion was constitutional. The Supreme Court of Virginia is the highest court in the State of Virginia.

On September 6, 1975, the trial court set bond at $1,000.00 pending disposition of the matter in the Supreme Court of Virginia and appellant was freed pursuant to that bond. On October 27, 1975, the Supreme Court of Virginia issued an order staying the execution of the judgment rendered on October 10, 1975. The appellant remains free on bond pending this appeal.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

This appeal raises the question whether an ordinance which proscribes "keeping and maintaining a disorderly house" is void for vagueness and therefore violative of the due process provisions of the Fourteenth Amendment to the Constitution.

In analogous situations on a claim of void for vagueness, this court has held that substantial federal questions are raised. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Colten v. Kentucky*, 407 U.S. 104 (1972); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

The precedents established by this court require the reversal of the decision of the Supreme Court of Virginia. It is a basic principle of the due process clause of the Fourteenth Amendment that state statutes and city ordinances are void for vagueness if their prohibitions are not clearly defined. A criminal law must give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. *United States v. Harriss*, 347 U.S. 612 (1954). No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

The rationale behind the vagueness doctrine is best summarized by this court in *Grayned v. City of Rockford*, 408 U.S. 104, at 108-109 (1972). "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *United States v. Harriss*, 347 U.S. 612 (1954); *Jordan v. DeGeorge*, 341 U.S. 223 (1951);

Lanzetta v. New Jersey, 306 U.S. 451 (1939); *Connally v. General Construction Co.*, 269 U.S. 385 (1926); *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921); *International Harvester Co. v. Kentucky*, 234 U.S. 216 (1914). Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. *Papachristou v. City of Jacksonville*, supra; *Coates v. Cincinnati*, 402 U.S. 611 (1971); *Gregory v. Chicago*, 394 U.S. 111 (1969); *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968); *Ashton v. Kentucky*, 384 U.S. 195 (1966); *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965); *Kunz v. New York*, 340 U.S. 290 (1951); *Saia v. New York*, 334 U.S. 558 (1948); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Herndon v. Lowry*, 301 U.S. 242 (1937). A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application (footnote 5 omitted).... Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone'...than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, at 372 (1964), quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958). See *Interstate Circuit v. Dallas*, supra, at 684; *Ashton v. Kentucky*, supra, at 195, 200-201; *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *Smith v. California*, 361 U.S. 147, 150-152 (1959); *Winters v. New York*, 333 U.S. 507 (1948); *Stromberg v. California*, 283 U.S. 359 (1931).

In arriving at their decision that the portion of the ordinance under which Flannery was convicted was

constitutionally sound, the Supreme Court of Virginia went through a two-tier reasoning process. First, they held that "keeping and maintaining a disorderly house" may properly be excised and considered separately from the remainder of the ordinance.[4] Secondly, they held that the excised portion of the ordinance, under which the appellant was convicted, was not void for vagueness and unconstitutional. The court found that the keeping of a disorderly house was a common law offense defined as "the maintenance of premises upon which activity occurred that either created a public disturbance or, although concealed from the public, constituted a nuisance *per se*, such as a gambling house or a bawdy house." *Harris v. United States*, 315 A.2d 569, at 572 (D.C. App. 1974) (footnotes omitted). Guided by this common law definition, the Court found that a person of ordinary intelligence can readily understand that it is unlawful in Norfolk to maintain a place where persons engage in activity which either creates a public disturbance or, although hidden from public view, constitutes a nuisance *per se*. Thus, according to the opinion filed by the Supreme Court of Virginia in this matter, the void for vagueness challenges are met. The court's faulty reasoning is blatantly apparent upon a reading of the opinion. The common law definitions of a "disorderly" house, upon which the court based its opinion, are equally as vague as the ordinance. A person of ordinary intelligence can no more ascertain what a

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[4] Section 1-3 of the Norfolk City Code provides:

"Sec. 1-3. Seperability.

If any part or parts, section or subsection, clause or phrase of this Code is for any reason declared to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portion of this Code."

"public disturbance" is or a "nuisance *per se*" is, than can he ascertain what is meant by a "disorderly" house.

This court has repeatedly struck down ordinances of the type the appellant challenges here. The latest Supreme Court of the United States decision applicable to the facts at hand is *Papachristou v. City of Jackson*, supra, wherein a Jacksonville, Florida, vagrancy ordinance which deemed that persons engaging in certain proscribed activity, including being a "disorderly person", would be considered vagrants and be subject to criminal sanctions. The ordinance was struck down as being void for vagueness.

CONCLUSION

This appeal raises an issue of fundamental importance to our system of criminal justice. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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APPENDIX A

NORFOLK CITY CODE §31-18

Sec. 31-18. Disorderly houses.

It shall be unlawful for any person in the city to keep, maintain or operate, for himself or as an officer of or agent for any corporation, association, club, lodge or other organization, or under the guise of any corporation, association, club, lodge or other organization, any disorderly house or place where disorderly persons meet or may meet for the purpose of illegally dispensing or indulging in intoxicating liquors, gaming or boisterous or other disorderly conduct. Each day's keeping of any such place shall constitute a separate offense, and in any prosecution for this offense, the general reputation of such place may be proved.

It shall be unlawful for any person to frequent, reside in or visit any such place for the purpose of illegally dispensing or indulging in intoxicating liquors, gaming or boisterous or other disorderly conduct.

Any person violating the first paragraph of this section shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars or by confinement in jail not exceeding six months, either or both; and any person violating the second paragraph of this section shall be punished by a fine of not less than five dollars nor more than one hundred dollars. (Code 1950, §29-13; Ord. 18,721, 2-5-57, §1.)

APPENDIX B

PRESENT: All the Justices

ROBERT M. FLANNERY

v. Record No. 750022

CITY OF NORFOLK

OPINION BY JUSTICE
A. CHRISTIAN COMPTON
Richmond, Virginia,
October 10, 1975

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK
William Moultrie Guerry, Judge

The defendant, Robert M. Flannery, was convicted by the circuit court, sitting without a jury, upon a warrant which charged him with "keeping and maintaining a disorderly house", in violation of a Norfolk City Ordinance. He appeals from the judgment of conviction which ordered a fine, a jail term (a portion of which was suspended), and supervised probation.

The central issue on appeal is whether §31-18 of the Norfolk City Code is unconstitutional on its face. Specifically, the question is whether the ordinance is void for vagueness. It provides that:

> "It shall be unlawful for any person in the city to keep, maintain or operate, for himself or as an officer of or agent for any corporation, association, club, lodge or other organization, or under the guise of any corporation, association, club, lodge or other organization, any disorderly house, or place where disorderly persons meet or may meet for the purpose of illegally dispensing or indulging in intoxicating liquors, gaming or boisterous or other disorderly conduct. Each day's keeping of any such place shall constitute a separate offense, and in any prosecution for this offense, the general reputation of such place may be proved.
>
> "It shall be unlawful for any person to frequent, reside in or visit any such place for the purpose of illegally dispensing or indulging in intoxicating liquors, gaming or boisterous or other disorderly conduct.
>
> "Any person violating the first paragraph of this section shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars or by confinement in jail not exceeding six months, either or both; and any person violating the second paragraph of this section shall be punished by a fine of not less than five dollars nor more than one hundred dollars."

The evidence, viewed in the light most favorable to the City, establishes that during the period from August 24, 1973, to February 28, 1974, the defendant owned and operated the "Business Man's Massage Parlor," located in Norfolk. The testimony showed that during this period the masseuses, who were employees of the defendant, performed for the male customers various "services" which included acts of masturbation and oral sodomy. The masseuses were virtually nude while engaged in these activities. The evidence also established that the masseuses solicited the clientele for prostitution and sodomy. Furthermore, there was testimony that the massage parlor, which was open to the public, was reputed in the community to be a brothel.

The defendant attacks the constitutionality of the ordinance, claiming that "it is vague and ambiguous and is violative of the due process requirement of

definiteness in criminal statutes." He argues there was no evidence that intoxicating liquors were dispensed or used on the premises, nor was there any evidence of gaming or boisterous conduct thereon. He reasons, therefore, that "[e]ffectively, . . . what is left is a conviction for keeping and maintaining a house where disorderly persons meet for the purposes of indulging in disorderly conduct", which he contends does not withstand a constitutional challenge.

The City argues, *inter alia*, that the ordinance "conceptually" contains separate parts, the first pertinent part providing: "It shall be unlawful for any person in the city to keep, maintain or operate, for himself . . . any disorderly house. . . ." It emphasizes that Flannery was charged with a violation of only that part of the ordinance. It takes the position that such part meets constitutional requirements because "keeping a disorderly house" is a common law offense with a constitutional common law definition. We agree and affirm.

Manifestly, an analysis of the ordinance shows that its first sentence is logically divided into distinct and different parts by the disjunctive "or," which follows the phrase "disorderly house." The first part of this sentence proscribes, on the one hand, keeping, maintaining or operating "any disorderly house," while the second part, on the other hand, prohibits keeping, maintaining or operating any "place where disorderly persons meet or may meet for the purpose of illegally dispensing or indulging in intoxicating liquors, gaming or boisterous or other disorderly conduct." The first part is not contingent upon the second nor does the latter qualify the former. A "house" may be "disorderly" without being a "place" where illicit trafficking in alcohol, gambling or noisy activity takes place, as, for example, a house of prostitution or a place open to the public where persons congregate to engage in homosexual conduct.

Accordingly, we conclude that the first part of the ordinance, which prohibits keeping, maintaining or operating a disorderly house, may properly be excised and considered separately from the remainder of the ordinance. Even if we assume that the remainder of the first and second paragraphs is invalid–an issue we do not reach in this case–this severance for the purpose of constitutional analysis is authorized by the saving provisions of Norfolk City Code §1-3,[1] and the valid portion may stand alone. This is so because the presumption of inseparability is reversed by the foregoing ordinance and, further, because we are of the opinion that it was the intent of the Norfolk City Council to make the keeping, maintaining or operating of a disorderly house a criminal offense, even though it was included in an ordinance which purported to make other acts criminal offenses. *Wicks v. City of Charlottesville*, 215 Va. 274, 277, 208 S.E.2d 752, 755 (1974). *See Board of Supervisors v. Rowe*, 216 Va. 128, 147-48, 216 S.E.2d 199, 214-15 (1975).

As we turn to the crux of this appeal, it should be remembered, as the City emphasizes, that the defendant

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[1] "Sec. 1-3. Separability. If any part or parts, section or subsection, sentence, clause or phrase of this Code is for any reason declared to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this Code."

was charged in the warrant and tried for "keeping and maintaining a disorderly house." He was *not* charged with maintaining "a place where disorderly persons meet or may meet" either "for the purpose of illegally dispensing or indulging in intoxicating liquors" or for the purpose of "gaming or boisterous or other disorderly conduct." Nor was he charged under the second paragraph of the ordinance. The evidence was entirely sufficient to support a conviction of the charged offense and we reject out of hand the defendant's claim that the evidence was insufficient.

This brings us directly to the constitutional issue. If the offense stated in the excised part of the ordinance is ambiguous, the conviction must be set aside. But if the statement of the offense is not void for vagueness, the conviction must stand.

The United States Supreme Court, in applying the vagueness doctrine to state statutes and city ordinances under the due process requirement of the Fourteenth Amendment, has stated that the doctrine is based on the principle that no person "shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Colten v. Kentucky*, 407 U.S. 104, 110 (1972), *quoting United States v. Harriss*, 347 U.S. 612, 617 (1954). "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." 407 U.S. at 110. An ordinance is void for vagueness if it fails to give a reasonably intelligent person fair notice that his

contemplated conduct is forbidden by the enactment, and if "it encourages arbitrary arrests and convictions." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). *See Caldwell v. Commonwealth*, 198 Va. 454, 458, 94 S.E.2d 537, 549 (1956).

In determining whether a legislative enactment is unconstitutionally vague, the Supreme Court has considered whether the words used have a well-settled common-law meaning, *Lanzetta v. New Jersey*, 306 U.S. 451, 454-55 (1939); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926), and whether the state's case law demonstrates that the language used, while otherwise vague, has been judicially narrowed. *Grayned v. City of Rockford*, 408 U.S. 104, 111-12 (1972). *See Parker v. Levy*, 417 U.S. 733, 752-54 (1974).

We now examine the excised language of the ordinance under consideration in the light of the foregoing established criteria.

The keeping of a disorderly house[2] was a common-law offense, 2 *Wharton's Criminal Law and Procedure* §764 at 592 (R. Anderson 1957), and the offense was defined as "the maintenance of premises upon which activity occurred that either created a public disturbance or, although concealed from the public, constituted a nuisance *per se*, such as a gambling house or bawdy house." *Harris v. United States*, 315 A.2d 569, 572 (D.C. Ct. App. 1974) (footnotes omitted). "The rationale for this common-law rule rested upon the potential in these 'houses' for breach of the peace that is inherently present in numbers of persons frequenting

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[2]At common law, a disorderly house was a public nuisance. *Pope v. Commonwealth*, 131 Va. 776, 793, 109 S.E. 429, 435 (1921).

such places for unlawful purposes." *Id.*; *Wharton, op. cit.*, §763 at 591.

Guided, therefore, by this settled common-law definition of the crime as applied to the excised portion of the ordinance, a person of ordinary intelligence can readily understand that it is unlawful in Norfolk to maintain a place where persons engage in activity which either creates a public disturbance or, although hidden from public view, constitutes a nuisance, *per se*.[3] By the same token, arbitrary action by those persons who must apply the terms of the offense, that is, police officers, prosecutors, judges and jurors, is sufficiently restricted by this well-settled common-law definition. For example, any reasonably intelligent person would know that repeated acts of oral sodomy, and solicitation therefor, performed in a commercial establishment open to the public by undressed females, constitutes a nuisance *per se* and, therefore, permitting such conduct to take place is unlawful under this ordinance. We conclude, therefore, that the excised language of the ordinance, as thus construed, sufficiently defines the offense charged and that it withstands the defendant's constitutional attack. We further hold, as previously stated, that the evidence was fully sufficient to show that the activity conducted on the

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[3]The term nuisance *per se* is restricted in its use "to such things as are nuisances at all times and under all circumstances." *Price v. Travis*, 149 Va. 536, 547, 140 S.E. 644, 647 (1927). By statute in Virginia, whoever maintains any building used for the purpose of "lewdness, assignation or prostitution" is guilty of a nuisance, and the building where such conduct is permitted is declared a nuisance. Code §48-7.

premises kept by defendant constituted a nuisance *per se*.

The defendant, in his broadside attack on the entire ordinance, takes the position that it punishes "disorderly conduct" and "disorderly persons." He argues that the vagueness of these terms invalidates the ordinance. But the defendant has no standing to make such a challenge in this case. As we have demonstrated, he was not charged with either "disorderly conduct" or as a "disorderly person." Even if those portions of the ordinance are invalid, he is not affected because he was convicted of keeping a disorderly house, and he will not be permitted to attack its validity as applied to others who may be prosecuted for disorderly conduct or as disorderly persons. *Wicks v. City of Charlottesville, supra*, 215 Va. at 277-78, 208 S.E.2d at 755. *See Parker v. Levy, supra*, 417 U.S. at 755.

Finally, the defendant contends that the trial court erred in refusing to grant his motions for a mistrial after certain statements, which the defendant alleges were inflammatory, were made by the prosecutor and by a witness for the City. The attorney for the City, during opening statement, said that the case involved "one of the most infamous of the massage parlors" and that it had "a reputation in the community as being a legalized whorehouse." Sergeant C. J. Morgante of the Norfolk Police Department, after testifying that the massage parlor was "a whorehouse, a house of ill repute, [and] an illegal house of prostitution," stated that "[i]t is a filthy place, [it] makes Granby Street filthy, its [___], that is what one said to me." In overruling the motion for a mistrial made after the preceding testimony, the trial judge stated that he was not offended by the vulgarism.

We reject the defendant's contentions, even if we assume that the statements were improper. This was a bench trial and judges are suited by training and experience to disregard potentially prejudicial comments. *See Akers v. Commonwealth*, 216 Va. 40, 45, 216 S.E.2d 28, 31 (1975). We find no abuse of discretion in the denial of a mistrial.

For these reasons, the conviction is

Affirmed.

APPENDIX C

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

ROBERT M. FLANNERY,	:	
Plaintiff in error,	:	FILED
	:	SUPREME COURT OF
v.	:	VIRGINIA
CITY OF NORFOLK,	:	November 6, 1975
Defendant in error.	:	
		RECORD NO. 75-0022

NOTICE OF APPEAL TO
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the plaintiff in error, Robert M. Flannery, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Virginia affirming the judgment of conviction entered herein on October 10, 1975.

This appeal is taken pursuant to 28 U.S.C., Section 1257(2).

/s/Hunter W. Sims, Jr.
Hunter W. Sims, Jr., Esquire
Canoles, Mastracco, Martone, Barr & Russell
1710 Virginia National Bank Building
Norfolk, Virginia 23510

Date: November 5, 1975

CERTIFICATE

I hereby certify that on this the 5th day of November, 1975, a true copy of the foregoing was mailed to Philip R. Trapani, City Attorney, 908 City Hall Building, Norfolk, Virginia 23510, and Andrew P. Miller, Attorney General, Supreme Court Building, 1101 E. Broad Street, Richmond, Virginia 23219, counsel for defendant in error, and to Thomas W. Moss, Jr., Esquire, Moss & Moss, 830 Maritime Tower, Norfolk, Virginia 23510, counsel for plaintiff in error.

/s/Hunter W. Sims, Jr.
Hunter W. Sims, Jr.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-966

ROBERT M. FLANNERY,

Appellant,

v.

CITY OF NORFOLK, VIRGINIA,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF VIRGINIA

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The appellee moves this Honorable Court to dismiss this appeal, or, in the alternative, to affirm the decision of the Supreme Court of Virginia on the ground that the question presented is so unsubstantial as not to need further argument, in that the ordinance challenged gave appellant fair warning of the criminality of his own conduct.

QUESTION PRESENTED BY THE APPEAL

The only question before this Court is whether or not that portion of Section 31-18 of The Code of the City of Norfolk, Virginia, 1958, as amended, which makes it unlawful for any person to keep, maintain or operate any disorderly house, as it was applied to Flannery under the facts in this case, is void for vagueness.[1]

STATEMENT OF THE FACTS OF THE CASE

Mr. Flannery owned and operated the Businessman's Massage Parlor located at 151 Granby Street, Norfolk, Virginia (App. 21, 32, 55-58, 107, 161, 162, 220)[2] (hereinafter referred to as "massage parlor"), and it had a reputation in the community for being a whorehouse (App. 28, 169).

On August 25, 1973, Officer Reilly of the Norfolk Police Department, entered the massage parlor and asked for a massage. After paying, he was directed to a room. When the masseuse came in she took off her bra for an extra ten dollars, and she told the officer he could play with her breasts. She then massaged his

[1] *United States v. Powell*, ____ U.S. ____, 96 S.Ct. ____, 46 L.Ed.2d 228 (1975). Since the issue of vagueness was the only federal question raised in the Supreme Court of Virginia, it is the only question before the Court in this case. *Street v. New York*, 394 U.S. 576, 582, 89 S.Ct. 1354, 22 L.Ed.2d 572, 579 (1969); *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1162, 22 L.Ed.2d 398, 400 (1969); *Bailey v. Anderson*, 326 U.S. 203, 207, 66 S.Ct. 66, 90 L.Ed. 3, 6 (1945); *Miller v. Nichols*, 4 Wheat. (17 U.S.) 311, 315, 4 L.Ed. 578, 579 (1819).

[2] All references with App. are to the page of the Appendix filed with the Supreme Court of Virginia in this case.

penis attempting to masturbate him (App. 59, 62, 63).

On September 1, 1973, Officer Reilly again entered the massage parlor, paid for a massage, and went to a back room. The masseuse again exposed her breasts by removing her blouse for an extra ten dollars. During this massage, she also solicited the officer for oral sodomy and sexual intercourse at a price, and without waiting for a reply attempted to place the officer's penis in her mouth. When he declined the offers, she massaged his penis attempting to masturbate him (App. 77-79).

On October 6, 1973, Officer Showalter entered the same massage parlor and paid sixty dollars for a super deluxe unisex massage. During this massage the masseuse wore nothing but pantyhose, exposing her breasts, and solicited the officer for oral sodomy. He declined her offer, and she then masturbated him to orgasm (App. 85-88).

On November 9, 1973, one Woody Richards, while working as an undercover agent for the Norfolk Police Department, entered this same massage parlor and paid for a massage. He was taken to a back room, where for ten dollars extra, the masseuse masturbated him to orgasm (App. 91).

On January 31, 1974, the same Woody Richards, still working as an undercover agent for the Norfolk Police Department, entered the massage parlor. He paid twenty dollars and was taken to a room. While in the room he was solicited for prostitution and made a date to consummate the act of sexual intercourse at a local hotel. The masseuse then masturbated Richards to orgasm (App. 92).

On February 8, 1974, Officer Acey of the Norfolk Police Department entered the same massage parlor and

paid for a massage. He was also masturbated (App. 99, 100).

On February 28, 1974, the date charged in the warrant, Officer Peterson entered this same massage parlor and paid for his massage. During the massage the masseuse solicited him for "something else" at a price of fifteen dollars, and subsequently masturbated him to orgasm (App. 104, 105).

Moreover, on December 14, 1973, Robert Flannery pleaded guilty to keeping and maintaining a house of ill fame on the premises of this same massage parlor, the date of the offense being September 1, 1973 (App. 37, 39-41, 44-46, 305, 306). Flannery knew there were convicted prostitutes working at the massage parlor but refused to take any action in reference thereto (App. 51). While it was his claim that he fired girls who would not stop soliciting, masturbating, etc. (App. 277), he did not answer when he was asked why Debra Dion Scott, a masseuse arrested in September, 1973, for masturbating Officer Reilly, was still there on May 8, 1974 (App. 240). In addition, Flannery told one police officer that if his girls did not masturbate the customers he would go out of business (App. 163).

Jeanne Rackham, an ex-employee of Flannery's at the massage parlor (App. 107) testified that Flannery had fondled her breasts while at the massage parlor (App. 109), and on a number of occasions, in her presence, fondled the breasts of other masseuses (App. 120, 131), also on the premises. She also had sexual intercourse with Robert Flannery more than one time while at the massage parlor (App. 109-111).

Miss Rackham also testified that on one occasion she observed another masseuse, naked, enter a massage

room with a customer who had solicited both of them for prostitution (App. 117-118).

The trial judge found the testimony of the police officers and undercover agent credible (App. 301) and that Jeanne Rackham's testimony was not entirely incredible (App. 302); he found that Flannery owned and operated the massage parlor (App. 300, 301); that he had knowledge of the myriad illegal activities which took place there (App. 303)[3] and that he did not make sufficient efforts to stop them (Id.)[4]

THE FEDERAL QUESTION IS NOT SUBSTANTIAL AND THE APPEAL SHOULD BE DISMISSED OR IN THE ALTERNATIVE THE DECISION SHOULD BE AFFIRMED

That portion of Section 31-18 of The Code of the City of Norfolk, Virginia, 1958, as amended, which Flannery is challenging reads as follows:

> "It shall be unlawful for any person in the city to keep, maintain or operate, . . . any disorderly house . . . ."[5]

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[3] Flannery testified that he owned the massage parlor (App. 220), and that he constantly checked it (App. 226). He knew that his girls were always "doing something wrong" (App. 243).

[4] In determining sentence the trial court had evidence that Flannery had "been in and out of trouble for the past 24 years" (Presentence Report, p. 5), including nine misdemeanor convictions as an adult and a finding of not innocent on charges of "break and enter" and "larceny" as a juvenile (Presentence Report, pp. 1 and 2).

[5] Since Flannery was only charged with and convicted of keeping and maintaining a disorderly house, it is the only portion of the ordinance he has standing to challenge, if he has standing at all. *Colten v. Kentucky*, 407 U.S. 104, 111 fn. 3, 92 S.Ct. 1953, 32 L.Ed.2d 584, 590 fn. 3 (1972).

In its decision below, the Supreme Court of Virginia properly looked to the common law for the definition of a disorderly house. *Gilbert v. United States*, 370 U.S. 650, 655, 82 S.Ct. 1399, 8 L.Ed.2d 750, 754 (1962). Stating this already existing common law definition, the court held that keeping a disorderly house was:

> "[T]he maintenance of premises upon which activity occurred that either created a public disturbance or, although concealed from the public, constituted a nuisance *per se*, such as a gambling house or bawdy house." 216 Va. at 366, 218 S.E.2d at 734.

This has always been the law of Virginia. *Pope v. Commonwealth*, 131 Va. 776, 793, 109 S.E. 429, 435 (1921).

Nuisances *per se* are those things which "are nuisances at all times and under all circumstances". *Price v. Travis*, 149 Va. 536, 547, 140 S.E. 644, 647 (1927). Moreover, Section 48-7 of the Code of Virginia, 1950, as amended, declares that any person who knowingly maintains any building used for the purpose of "lewdness, assignation or prostitution . . . is guilty of (maintaining) a nuisance, ... " In enacting this statute the General Assembly of Virginia simply restated the well established common law rule that bawdyhouses or houses of lewdness, assignation or prostitution constitute nuisances *per se*. *Tedescki v. Berger*, 150 Ala. 649, 43 So. 960, 961, 11 L.R.A. (N.S.) 1060 (1907); *Weakley v. Page*, 102 Tenn. 178, 53 S.W. 551, 554 (1899); *Clementine v. State*, 14 Mo. 112, 115 (1851).

Since everyone is bound and presumed to know the law, *Lambert v. California*, 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed.2d 228, 231 (1957); *Shelvin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68, 30 S.Ct. 663, 54 L.Ed. 930, 935 (1910), and since Flannery was clearly

maintaining a house of prostitution, he cannot successfully challenge the ordinance for vagueness. There could have been no doubt in Flannery's mind that he was in violation of the ordinance, and as this Court recently held in *Parker v. Levy*, 417 U.S. 733, 756, 94 S.Ct. 2547, 41 L.Ed.2d 439, 458 (1974):

> "[O]ne who has received fair warning of the criminality of his own conduct from the statute in question is . . . (not) . . . entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. *One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.*" (Emphasis added.)

See also: *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908, 37 L.Ed.2d 830, 839 (1973); *Austin v. Aldermen of Boston*, 7 Wall. (74 U.S.) 694, 699, 19 L.Ed. 224, 226 (1869).

This Court has recently decided *Rose v. Locke*, ____ U.S. ____, 96 S.Ct. ____, 46 L.Ed.2d 185, 188 (November 17, 1975), a case which involved a challenge of Tennessee's statute prohibiting "crimes against nature" on grounds of vagueness. The Court held:

> "It is settled that the fair warning requirement embodied in the Due Process Clause (only) prohibits the States from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed.' (Citations omitted.)"

And in *United States v. Powell, supra*, at 46 L.Ed.2d 233, the Court held:

> "[I]t is well established that vagueness challenges to statutes which do not involve First Amendment

freedoms must be examined in the light of the facts of the case at hand."

See also: *United States v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710, 42 L.Ed.2d 706, 713 (1975); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32, 83 S.Ct. 594, 9 L.Ed.2d 561, 565 (1963).

Flannery certainly understood his conduct to be proscribed by the ordinance. Not only did his testimony reveal this fact,[6] but as the Supreme Court of Virginia commented in its decision below at 216 Va. 367, 218 S.E.2d 734:

"[A]ny reasonably intelligent person would know that repeated acts of oral sodomy, and solicitation therefor, performed in a commercial establishment open to the public by undressed females, constitutes a nuisance *per se* (house of prostitution) and, therefore, permitting such conduct to take place is unlawful under this ordinance."

Finally, it is urged that Flannery, as a matter of law, lacks standing to challenge this ordinance. As was said in *Parker v. Levy, supra*, 417 U.S. at 756, 41 L.Ed.2d at 457 in reversing the Court of Appeals:

"The result of the Court of Appeals' conclusion that Levy had *standing* to challenge the vagueness of these articles as they might be hypothetically applied to the conduct of others, even though he was squarely within their prohibitions, may stem from a blending of the doctrine of vagueness with the doctrine of overbreadth, but we do not believe it is supported by prior decisions of this Court." (Emphasis added.)

[6] Flannery testified at the trial that he was aware that his girls were always "doing something wrong" (App. 243).

And in *Broadrick v. Oklahoma, supra*, 413 U.S. at 610, 37 L.Ed.2d at 839:

"Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied *will not be heard to challenge that statute* on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." (Emphasis added.)

CONCLUSION

The latest Supreme Court of the United States decision applicable to this case is *Rose v. Locke, supra*. Under the rules laid down by this Court in that case just over two months ago, this ordinance is constitutional. And it is clear that under the facts in this case, the ordinance certainly was not vague as it was applied to Mr. Flannery. *United States v. Powell, supra*. Moreover, there is a strong presumption that ordinances are constitutional, and the burden is on Mr. Flannery to show the contrary, which he has not done. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S.Ct. 114, 71 L.Ed. 303, 311, 54 A.L.R. 1016 (1926). Wherefore, the appellee, the City of Norfolk, respectfully requests this Court to grant its Motion to Dismiss for want of a substantial federal question, *Zucht v. King*, 260 U.S.

174, 176, 43 S.Ct. 24, 67 L.Ed. 194, 198 (1922), or in the alternative to affirm the decision of the Supreme Court of Virginia.

Respectfully submitted,
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CERTIFICATE

I hereby certify that on the 9th day of February, 1976, a true copy of the foregoing was mailed to Thomas W. Moss, Jr., Esquire, Moss and Moss, 830 Maritime Tower, Norfolk, Virginia 23510, and Hunter W. Sims, Jr., Esquire, Canoles, Mastracco, Martone, Barr and Russell, 1710 Virginia National Bank Building, Norfolk, Virginia 23510, counsel for appellant.

/s/ Philip R. Trapani
Philip R. Trapani